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IN THE

Supreme Court of the United States

October Term, 1960

No. 54

CARL BRADEN,

Petitioner,

—v.—

UNITED STATES

PETITIONER'S REPLY BRIEF

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The Government's response to Petitioner appears in its briefs herein and in *Wilkinson* v. *United States*, No. 37, this Term. The Government argues therein that the instant case is indistinguishable from *Barenblatt* v. *United States*, 360 U. S. 109, and that the decision in that case should be adhered to.

With respect to the differences between this case and *Barenblatt*, Petitioner rests upon the argument set forth in his principal brief (Point I, pp. 19-29). Should the Court feel that these differences are not sufficient, we urge that the *Barenblatt* decision be reconsidered.

We submit that the Committee's mandate as written and applied generally since its creation and in this case, has violated the First Amendment and has been used for exposure rather than for legislation.

I.

Rule XI (17) of the Rules of the House of Representatives authorizes the Committee to investigate "Un-American propaganda activities in the United States." An implementing section of the Rule authorizes the Committee "to require the attendance of such witnesses and the production of such books, papers and documents and to take such testimony, as it deems necessary." This delegation of power to compel American citizens to answer questions concerning "propaganda activities" violates the First Amendment's prohibition against "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." See Meiklejohn, *The Barenblatt Opinion*, 27 Univ. Chic. Law Rev. (1960) 329, 332. The qualification "Un-American" does not lend validity to the Rule, since that is a term used by the Committee to describe all opinions of which it disapproves.

The breadth of the term is indicated by its application in the pending contempt cases. It will be recalled in the early case of *United States* v. *Josephson*, 165 F. 2d 82, 88 *cert. den.* 333 U. S. 838, *reh. den.* 333 U. S. 858, a more restrictive interpretation upon this mandate was intimated by the Court of Appeals of the Second Circuit:

> "* * * At the very least the language of the authorizing statute permits investigating the advocacy of the idea that the Government or the Constitutional system of the United States should be overthrown by force, rather than modified by the peaceful process of amendment of the Constitution set forth in Article V. The vice of vagueness in that language, if any, lies in the possibility that it may authorize, though we do not decide that it does so, investigations relating to the advocacy of peaceful changes. The appellant could, for example, have been asked whether he knew of propaganda activities designed

> to bring about the immediate destruction of the Government by violence and the question, as he clearly would have known, would have been pertinent." * * *

That Court was not required to resolve the problem because, as it said:

> "Having refused to answer any questions whatsoever, he cannot now claim that the authorizing statute is invalid merely because it did not furnish him with criteria that were sufficiently definite to permit him to determine the pertinency of some question that might never have been asked him." (*Ibid.*)

In this case and *Wilkinson's*, the Court below and the Government give the mandate a meaning going far beyond even "investigations relating to the advocacy of peaceful changes" (165 F. 2d at 88). "Un-American propaganda activities" are deemed to include criticism of the Committee; a petition to Congress is investigated because the petitioner might have been a Communist. *Wilkinson* v. *United States*, 272 F. 2d 783, 787; Govt. Br. in No. 37, pp. 27, 51-52; *Brader* v. *United States*, R. 118; Govt. Br. in No. 54, pp. 63-64.

We have thus come full circle from the investigation of the "advocacy of the idea that the Government or the Constitutional system of the United States should be overthrown by force" (*United States* v. *Josephson*, *supra*, at 88) to the investigation of "Communist criticism of the Committee and Communist petitions to Congress" (Govt. Br. p. 30). We know what the author of the concurring opinion in *Whitney* v. *People of State of Calif.*, 274 U. S. 357, 375, would have said:

> "* * * that the greatest menace to freedom is an inert people; that public discussion is a political

duty; and that this should be a fundamental principle of the American government."*

The history of the Committee's operations has borne out the sinister promise implicit in a mandate directed against "propaganda". It is a matter of widespread knowledge throughout the United States, and indeed the world, that the Committee exists as a major repressive force in this country against the exercise of activities protected by the First Amendment. This may not be clear if the Court considers each petitioner coming before it as if he were the only person who had ever been questioned by the Committee, but it is abundantly clear if the Court considers the twenty-two year history of the Committee.

In Appendix B to our principal brief herein (pp. 51-65), we have set forth in considerable detail the Committee's campaign against activities protected by the First Amendment. This analysis shows that the evils described in the prescient dissenting opinions of Chief Judges Clark and Edgerton, written respectively in *United States* v. *Josephson, supra,* and *Barsky* v. *United States,* 167 F. 2d 241, 252 (C. A. 2, 1948), *cert. den.* 334 U. S. 843 have been realized.

In the two cases now before the Court, the serious effect upon First Amendment rights is unescapable. If Frank Wilkinson, a resident of California, can be subpoenaed when and because he arrived in Atlanta, Georgia to engage in open criticism of the House Un-American Activities Committee, is he not being denied his constitutional right

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* As Mr. Justice Brandeis said elsewhere (dissenting in *Gilbert* v. *Minnesota,* 254 U. S. 325, 337-338 (1920)):

> "The right of a citizen of the United to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it." * * *

to criticize the Government? See Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 Univ. of Chic. Law Rev. 315 (1960).

Of what avail is it to exercise the right of criticism if a disapproving Government can impose the sanction of compulsory testimony? If petitioner herein can be subpoenaed and asked whether he was a member of the Communist Party at the time that he filed a petition with Congress, is not his right to file such a petition undermined? It should be borne in mind here that *the Government regards Count V, relating to petitioner's petition to Congress, as its strongest count* (Gov't Br., pp. 25, 37, 62).*

The use of the words in *Wilkinson*, "by impeding and crippling the operation of its legislative branch" (272 F. 2d 787) and in this case, "Communists were attempting to create the appearance of respectability", cannot derogate from the fact that the term "crippling" means no more than criticism, and that the propaganda for which "respectability" was allegedly sought in *Braden* was "propaganda" for integration.

The House Committee's activities have triggered numerous imitators on the national and local levels. Thus, *Shelton* v. *Tucker*, No. 14, October Term, 1960, is an example of the use of State law to interfere with membership in the NAACP by an inquiry into membership in various organizations. Similarly, *State of Florida* v. *Graham* (Cir. Ct. 2d Jud. Dist., Leon City, Fla.) involves convictions of two Negro ministers for refusing to surrender NAACP membership lists to a Florida legislative committee.

On the national level, the Senate's Internal Security Subcommittee has given rise to a host of cases, some now

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* Similarly, see the Brief for the United States in Opposition, pp. 7-8, ftn. 4.

pending in this Court, involving an interference with freedom of the press and other First Amendment rights?*

Each judicial decision supporting the power of investigation into activities thought to be protected by the First Amendment results in an expanding concept of legislative power. The earlier investigations began with the Communist Party (*see e.g. Barenblatt* v. *United States*). Later ones involved the NAACP (see *Shelton* v. *Tucker, supra*). More recently, they have involved the efforts of Dr. Linus Pauling and the Sane Nuclear Policy Committee to state their views on the issue of nuclear disarmament without interference by the Internal Security Subcommittee. See *Pauling* v. *Eastland*, No. 419, Oct. Term 1960, *cert. den.*

The fundamental defect in this massive loyalty investigation, we respectfully submit, lies in the *Barenblatt* concept that the interests of national security over-balance the individual's constitutional right of privacy. We do not assert here, of course, that national security is less important than the right of association. Our point is that the surrender of the second right is not necessary for the protection of the first one and, indeed, may be inconsistent with it.** This Court has frequently observed that

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* *Whitman* v. *United States*, No. 300, *Liveright* v. *United States*, No. 328, *Shelton* v. *United States*, No. 246, *Price* v. *United States*, No. 331, Oct. Term, 1960, *cert. pending.*

In addition, the validity of First Amendment claims before the House Un-American Activities Committee is raised in *Deutsch* v. *United States*, No. 233, Oct. Term, 1960, cert. grant. 29 L. W. 3102; *Gojack* v. *United States*, No. 313, *cert. pending;* and *Russell* v. *United States*, No. 239, *cert. pending.*

** The same problem was raised in the passport cases (*Kent & Briehl* v. *Dulles*, 357 U. S. 116). We respectfully call the Court's attention to the briefs filed in that case. There the Government sought to restrict the travel of individuals on the ground that they might commit unlawful actions abroad; here no claim of unlawful activity is asserted by the Government.

(Continued on page 7.)

a free and unharassed citizenry is the best guarantee of national security. See *e.g.*, *Whitney* v. *Calif.*, *supra*, concurring opinion, *passim*, and ftns. 3-5.

We submit most respectfully that the Congress could not have been aided one whit in its search for new legislative weapons against Communism by learning whether *Barenblatt* was a Communist, as a prior witness had alleged. Certainly national security is not aided by calling critics of the Committee such as Braden and Wilkinson before it.

The balancing doctrine of *Barenblatt* has been subjected to different types of criticism recently, of which the most noteworthy are referred to in a footnote.* We respectfully refer the Court to these comments by conscientious critics who attempt to assess the full implications of this Court's opinion in *Barenblatt*. It is our earnest hope that if the point is reached by this Court it will proceed to a reconsideration of the *Barenblatt* doctrine.

II.

The Government's briefs, First Amendment considerations aside, proceed upon the assumption, never quite explicit, that the Committee in the Atlanta investigations was seeking material for the purpose of recommending legislation to the Congress. We challenge this assumption.

(Continued from page 6.)

The House Committee has pressed this view that national security requires the disregard of all other rights by taking testimony from a psychiatrist with respect to confidential communications by a patient. (See Wingenbach, *Defectors And A Doctor's Oath*, N. Y. Herald-Tribune, Nov. 10, 1960, p. 28; also, Sidel, *Medical Ethics and the Cold War*, The Nation, Oct. 29, 1960.)

* Meiklejohn, *The Barenblatt Opinion*, 27 Univ. of Chic. L. Rev. 329 (1960); Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 Id. 315 (1960); Carr, *A Seesaw Between Freedom and Power*, 57 Univ. of Illinois Bulletin No. 75 (June, 1960).

The Government asserts that "the two subjects under inquiry when petitioner testified—Communist infiltration and propaganda activity in the South—are valid legislative purposes" (Br., p. 60).

This indicates a confusion between the subject under investigation and the purpose of the investigation, *i. e.*, whether it is legislative or for the purposes of exposure and interference with the right of association. Thus, in *United States* v. *Icardi*, 140 F. Supp. 383 (D. D. C. 1956), the subject under investigation was a perfectly legitimate one but the objective of the Committee therein involved was to secure a perjury indictment against a particular witness.

The Communist issue has been on the Committee's agenda for many years without any indication that legislation is intended or has resulted from the compulsory testimony of the putative objects of legislation (See Appendix B to our principal brief, pp. 51-65). The Committee's Annual Report for the year 1958 (H. Rep. 187, 86th Cong., 1st Sess.) does not support the Government's claims that the Atlanta hearings had a legislative purpose. The melange of testimony taken that year and the Committee's comments upon witnesses is essentially the same in each of its earlier annual reports. The discussion of "The Atlanta cases" (i.e., those of petitioner and *Wilkinson*) opens with this significant admission of the efforts at "exposure and punishment" and the reasons for subpoenaing these two persons:

> "At a hearing of the committee in Atlanta on July 29, 1958, one of the subjects of investigation was Communist Party propaganda activities in the South. The committee had issued a publication on November 8, 1957, describing a newly mounted abolition campaign against the House Committee on Un-American Activities, the investigative powers of Congress, and important functions of the Federal

> Bureau of Investigation, for the purpose of creating a general climate of opinion against the exposure and punishment of subversion. One of the Communist Party fronts described as being in the vanguard of this campaign was the Emergency Civil Liberties Committee." (p. 85).

The "legislative recommendations" in the Report are essentially the same ones that appear in every annual report of the Committee—regardless of whether there are hearings on these subjects or the nature of the testimony. We urge the Court to examine the annual reports of the Committee for the last five years for the purpose of confirming the validity of our charge. They relate to such matters as passports, the Smith Act and the loyalty program, which are clearly under the jurisdiction of other committees whose hearings and reports have led to the passage of bills on these subjects.

This Court will find particularly significant the Committee's recommendations in its 1958 annual report (issued March 9, 1959) of the following legislative proposals which the petitioner was told was the basis for his interrogation (R. 26):

1. *The proposed amendment of the Smith Act to define the word "organize"* to meet this Court's opinion in *Yates* v. *United States*, 298 U. S. 354. But the bill on this subject, H. R. 13272, 85th Cong., was reported by the House Judiciary Committee on August 6, 1958 and passed the House on August 12, 1958. (See Calendars of the United States House of Representatives and History of Legislation, 85th Cong. (Final Edition) p. 179).

2. *The proposed authorization of state sedition laws* to meet this Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497. But the bill on this subject, H. R. 3, 85th Cong., was reported by the House Judiciary Committee on June 13,

1958 and passed the House on July 17, 1958 (Calendars, etc., *supra*, p. 113) prior to petitioner's appearance.

These two examples, which could be repeated with respect to virtually every legislative proposal of the Committee, illustrate our point that the Committee holds hearings without regard to the nature of its recommendations and issues recommendations without regard to its hearings.

III.

We find most intriguing the Government's claim in *Wilkinson* that "the subcommittee was pursuing a valid legislative purpose even if it be assumed that its sole purpose was investigation of Communist Party criticism of the Committee and that such criticism does not constitute propaganda" (Br., p. 53).

The Government's argument is as follows:

1. "This Committee constantly has before it the issues whether it should be abolished, continue its present course or change or expand its activities."

2. In presenting the matter to the House of Representatives, "it is proper for the Committee to consider the source of the criticism at least where the Communist Party itself is the source of the criticism."

3. "The power of Congress to investigate—not to prohibit—petitioner's legal attempts to influence legislation is strongly supported by decisions of this Court", *i.e.*, *Burroughs* v. *United States*, 290 U. S. 534 and *United States* v. *Harriss*, 347 U. S. 612.

While the Committee has often claimed a wide jurisdiction, it has never gone so far as the Government's suggestion that the desirablity of continuing the Committee is a separate subject upon which the Committee was

authorized to compel testimony. Nor can we believe that the Government is seriously suggesting that the petitioner and Wilkinson were called because the Committee was considering a recommendation to Congress that it be abolished.

Further, assuming that the Committee may "consider the source of the criticism," (Govt. Br., No. 37, p. 54) may it do so by exercising its power of testimonial compulsion? Are Congressman James Roosevelt and Professor Alexander Meiklejohn, leading critics of the Committee, now subject to its questioning?

The Government's citation of *Burroughs* and *Harris* is relevant in that it shows how one grant of power leads to a demand for further power. The first case required the disclosure of financial contributors to election campaigns; the second required the disclosure of income and receipts of paid lobbyists. Neither case touched upon the present problem of First Amendment rights.

Recognizing the weakness of this argument, the Government argues that even if this objective is improper, Petitioner's conviction should stand if the Committee had some proper objectives. We do not understand how the Committee's bad purposes can be separated from the good. Moreover, as this Court has said: "One should not be held in contempt under a subpoena that is part good and part bad. * * * it is not upon the person who faces punishment to cull the good from the bad." *Bowman Dairy Company v. United States*, 341 U. S. 214, 221.

IV.

One further series of cases cited by the Government deserves comment (Gov't Br. No. 37, p. 57). None of them involved the problem presented here—the right of the Government to interrogate a citizen with respect to lawful

acts of association described in the instant case as "Un-American propaganda." Thus, *American Communications Association* v. *Douds*, 339 U. S. 382, involved the right of a labor union to use the processes of the National Labor Relations Board; *Garner* v. *Los Angeles Board*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485; *Lerner* v. *Casey*, 357 U. S. 468, involved the power of governmental employers to make political inquiries of its employees; *Galvin* v. *Press*, 347 U. S. 522; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; and *Carlson* v. *Landon*, 342 U. S. 524, related to the expulsion of aliens. *Dennis* v. *United States*, 341 U. S. 494, is completely irrevelant since it involves not the right of inquiry but the right to make certain conduct criminal, an issue not involved here.

Thus, again, we have seen the Government, starting with its plenary rights as employer, or as host to aliens, or as guardian of its agencies, pressing for and securing certain powers from the Congress and then attempting to treat the citizens generally as though they were in the special categories referred to above.

Such an attempt was made and these citations were offered in the recent passport cases, *Kent & Briehl* v. *Dulles*, *supra*. This Court adequately distinguished between the two categories. It should do so here.

V.

There are many other less important points in the Government's briefs in *Wilkinson* and *Braden* with which we take issue.* We do not regard them as sufficiently

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* We refer *e.g.* to the claims that petitioner "admitted" that pertinency was an issue of law for the Court (Br. 26), that he "indicated that he understood the pertinency" (Br. 51), that the Committee actually had "information" that the organizations here involved disseminated Communist propaganda (Br. 44); that petitioner knew the "questioning and testimony" of prior witnesses (Br. 27, 69).

significant to make reply to them. They pale before the fundamental issues presented by these petitions:

1. Is not the Government attempting in these cases, Wilkinson's and the petitioner's, to extend beyond its necessary and reasonable implications the drastic doctrine which emerged by a closely divided vote in the *Barenblatt* case?

2. Does not the interrogation of petitioner and of Wilkinson represent a most serious interference with the right to criticize the Committee, to seek its abolition and to take positions on legislation and public issues different from that of the Committee?

3. If, contrary to the view of petitioner, the *Barenblatt* doctrine controls these cases, then, should not *Barenblatt* be reconsidered and upon such reconsideration, reversed?

Respectfully submitted,

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